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No. 87-1344

In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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The sole issue in this case is the appropriate standard of review for constitutional challenges to prison regulations restricting printed matter entering federal prisons. Respondents contend (Br. 20) that the correct standard is the strict scrutiny approach of *Procunier* v. *Martinez*, 416 U.S. 396 (1974), rather than the "reasonableness" standard that this Court has applied to prison regulations that restrict prisoners' constitutional rights. See *Turner* v. *Safley*, No. 85-1384 (June 1, 1987); *O'Lone* v. *Estate of Shabazz*, No. 85-1722 (June 9, 1987).

Respondents concede that the "reasonableness" standard is the established test when prison regulations assertedly infringe the constitutional rights of prisoners (Br. 20). Respondents also concede that a prison is a nonpublic forum (*id.* at 30) in which rea-

sonableness is the touchstone of regulations of speech. Respondents further concede that prison officials should be empowered to exclude publications from prisons "for valid security reasons" (*id.* at 11, 15). Nonetheless, respondents argue that when they are directed at mailed publications, prison officials' efforts to ensure safety, security, and order within a prison may not be judged under a "reasonableness" standard. Respondents argue that in that setting strict scrutiny is required in order to protect the constitutional rights of publishers who send materials to federal prisons.

1. The BOP's regulations governing printed matter should not be reviewed under a strict scrutiny standard merely because of the regulations' incidental effect on publishers. The more intrusive degree of scrutiny that the Court adopted in *Martinez* responded to the "particularized interest[s]" of nonprisoners in communicating with identified inmates through personal letters (416 U.S. at 408). "[M]ass mailings" (*id.* at 408 n.11), such as those involved in this case, were not at issue in *Martinez*.

The personal correspondents in *Martinez* had very different interests at stake than are present here. For an inmate's civilian correspondent, there is no adequate substitute for a personal letter to or from a spouse, friend, or family member. Personal letters uniquely allow the expression of feelings and the conveying of information about particular people. By contrast, general publications are written without regard to any individual reader and contain no personalized messages. The publications are distributed to hundreds, perhaps thousands of readers.

These differences are vital to evaluating the effect of the BOP's regulations on First Amendment rights.

Broad restrictions of a civilian's personal correspondence with an inmate would substantially eliminate that form of communication altogether. In that sense, prison mail regulations work a "consequential restriction" on the First Amendment rights of civilians (*Martinez*, 416 U.S. at 409) that does not exist for publishers who have ready access to other audiences.[1] Publishers are not restrained from printing and selling their materials.[2] The BOP regulations address only publications having an impact on prison security, within prisons.

This Court's cases confirm that the "particularized interest" in *Martinez* turned on the personal and

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[1] Respondents appear to contend (Br. 22-23) that the prisoners' right to receive information from the publishers makes the rights of publishers "inextricably meshed" with prison subscribers within the meaning of *Martinez*, 416 U.S. at 409. But the constitutional right of prisoners to *receive* information cannot be used to elevate the standard of review. Prisoners' constitutional rights must be measured by a "reasonableness" standard, even when outsiders are involved. See *Block* v. *Rutherford*, 468 U.S. 577 (1984) (inmates' right to have contact visits); *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (inmates' right to receive hardback books from sources other than publishers and bookstores). If inmates could insist on strict scrutiny because of links with outsiders as tenuous as the ones in this case, the reasonableness standard would soon be riddled with exceptions.

[2] Respondents argue that it is irrelevant that publishers have other audiences, noting that a state could not defend an unconstitutional restraint on speech by pointing to the availability of similar speech in other states (Br. 24). The fallacy of this argument is that while one state may not wholly prohibit a type of speech simply because another state permits it, the Court has never held that within a single state every government facility must be made available for speech. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

unique nature of civilian correspondence with specific inmates rather than simply the fact that, as in this case, civilians were involved. In considering restrictions on face-to-face media interviews with inmates (*Pell* v. *Procunier*, 417 U.S. 817 (1974)) prohibitions on "bulk mailing" to inmates of prison union writings (*Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977)), and restrictions on inmates' receipt of hardback books except from publishers, book clubs, or bookstores (*Bell* v. *Wolfish*, 441 U.S. 520 (1979)) the Court never even raised the possibility of strict scrutiny. Yet each of those regulations had incidental effects on the First Amendment rights of non-inmates. In contrast, the Court cited *Martinez* in considering (but not deciding) whether strict scrutiny might apply to the regulation of marriages between inmates and civilians (*Turner*, slip op. 17). The periodical and book publishers in this case are more similarly situated to journalists seeking interviews (*Pell*), senders of hardback books (*Bell*), and authors of prison union materials (*Jones*) than they are to personal correspondents (*Martinez*) or, possibly, marriage partners (*Turner*). These cases demonstrate that respondents have no genuine "particularized interest" in sending their materials into federal prisons in the sense that the Court used that term in *Martinez*.[3]

[3] Respondents' effort to distinguish this Court's post-*Martinez* prison cases (Br. 36-37) is unavailing. For example, respondents distinguish some cases (*Block*, *Pell*, and *O'Lone*) that applied a reasonableness test when there were incidental effects on outsiders by asserting that each involved physical entry into the prison, which presents different security concerns. Yet the Court found such distinctions irrelevant when it refused to erect a "hierarchy of standards of review" based on whether an activity is "'presumptively dangerous'" (*Turner*, slip op. 8-9 (refusing to find the security concerns posed by inmate correspondence "qualitatively different" from those presented by the hardback books in *Block*)).

The factual distinctions between the burden on publishers in this case and the burden on personal correspondents in *Martinez* are not, as respondents suggest, legally irrelevant (Br. 22) nor is reliance on those distinctions incompatible with the First Amendment (*id.* at 23). The Court has never embraced the proposition that the First Amendment requires that mass publishers and specific individuals be similarly treated for all purposes.[4] The BOP's regulations recognize that different considerations are involved in regulating personal mail and other printed matter.[5] No decision of this Court requires

Respondents also argue that *Turner*, *Bell*, and *Jones* do not demonstrate the Court's adherence to a "reasonableness" standard when the "expression of ideas on paper" is involved. But each of those cases reduced the flow of written expression to inmates, and in each the Court adopted a reasonableness test.

[4] *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), on which respondents rely (Br. 22), is not to the contrary. In *Bellotti*, the Court considered a state law prohibiting corporate expenditures, under certain conditions, to influence ballot questions. The Court held only that "speech that otherwise would be within the protection of the First Amendment [does not lose] that protection simply because its source is a corporation" (435 U.S. at 784). But the Court left open "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities" (*id.* at 777-778 n.13).

[5] Respondents dispute (Br. 22 n.16) that their publications are "mass mailing[s]" as that term was used in *Martinez*, and they contend that the *Martinez* description better fits the "bulk mailings" involved in *Jones* v. *North Carolina Prisoners'*

that the different impact on civilians be ignored when regulating the different types of written matter that enter a prison.[6]

Respondents vastly exaggerate the significance of the BOP's regulations for the freedom "of the press." This case involves no prior restraint of the press and no elimination of viewpoints from public discussion. It would hardly "stand the First Amendment on its head" (Br. 23) to hold that prison officials have the authority to make reasonable exclusions of periodicals and books believed to be detrimental to prison security or order, simply because a different standard applies to personal letters. The press is not entitled to equal treatment with civilians who know inmates. *Pell* v. *Procunier*, 417 U.S. 817, 831 n.8 (1974) (upholding prohibition against face-to-face interviews of inmates by the press, although family, friends, attorneys, and clergy were permitted to have such visits). Moreover, reasonable prison regulations will not squelch public debate on "matters of public affairs," as respondents contend (Br. 23 n.18), and will not even do so among the prisoner population.[7] The BOP regulations are concerned solely with publications that threaten security, discipline, or good order (see Pet. App. 22a). Indeed, the regulations expressly provide that "[t]he Warden may not reject a publication solely because its content is religious, philosophical, political, social, or sexual, or because its content is unpopular or repugnant" (*ibid.*). Moreover, under any standard, respondents can challenge the exclusion of specific material. If there is no reasonable connection between an articulated and legitimate penological goal and the item is kept out, the inmate will prevail. A "reasonableness" standard will not license arbitrary censorship or the suppression of speech with which the Bureau disagrees.

Union, 433 U.S. at 124. Even apart from the dubious distinction between "bulk mailing" and "mass mailing," it is apparent that *Martinez* was drawing a distinction between "direct personal correspondence" and items that are sent to many people, such as the publications at issue here (see 416 U.S. at 408 & n.11).

[6] Respondents are simply wrong in asserting (Br. 24) that the Court has never upheld a total ban on written communication to part of an audience because of the availability of ample other audiences for the expression. In *Turner*, the Court sustained a prohibition of inmate-to-inmate communication in part because it did not "deprive prisoners of all means of expression." The Court noted that the regulation "bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned * * *" (slip op. 12). Thus, although the prison audience was made inaccessible, the remaining civilian audience was an adequate outlet (*ibid.*). See also *O'Lone*, slip op. 8. The BOP's regulations in this case similarly limit access only to the prisoner audience for particularized reasons while leaving open all civilian audiences.

[7] An important factor in *Martinez* was the potential of the regulations in that case to suppress criticism of the prison in outgoing letters. Indeed, nearly every fault the Court found in the regulations at issue arose from the prison officials' inability to explain how outgoing letters might "possibly lead to flash riots" or "might * * * encourage violence" within the prison itself (416 U.S. at 416). The Court has thus read *Martinez* to concern unjustified regulations of "communication[s] by inmates" (*Pell* v. *Procunier*, 417 U.S. at 826 (emphasis added)). See *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 19 (1978), "[I]n *Procunier* v. *Martinez*, *supra*, the Court invalidated prison regulations authorizing excessive censorship of outgoing inmate correspondence because such censorship abridged the rights of the intended recipients" (416 U.S. at 31 (Stevens, J., dissenting)). The BOP's regulations in this case pose no threat of removing criticism about prisons from public dialogue.

Respondents further argue (Br. 26-28) that the *Martinez* standard adequately addresses the needs of prison officials to limit the circulation of publications that are potentially detrimental to prison security. We disagree. The *Martinez* test requires that a regulation of prison speech "must be no greater than is necessary or essential" to achieve its goal and will be "invalid if its sweep is unnecessarily broad" (*Martinez*, 416 U.S. at 413-414). The *Martinez* test is not just semantically different from the reasonableness standard but launches the courts on a "least restrictive alternative" analysis (*Turner*, slip op. 14 n.*). As this Court has recognized, demanding adoption of the "least restrictive alternative" will require "prison officials * * * to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional claim" (slip op. 11). There may always be "some court somewhere [that] would conclude that it had a less restrictive way of solving the problem at hand" (*id.* at 9). Thus, strict scrutiny will inevitably reduce the ability of "prison administrators * * * and not the courts, to make the difficult judgments concerning institutional operations" (*Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. at 128).[8]

[8] As respondents note (Br. 27), some courts have upheld prison regulations restricting the entry of publications under a "strict scrutiny" standard. We do not believe that these cases provide useful guidance for determining the *constitutional* standard of review. To begin with, the decisions on which the court below relied (which were rendered prior to *Turner* and *Shabazz*) do not rest upon the First Amendment rights of outsiders; their holdings are apparently based entirely or primarily on the rights of prisoners. In light of *Turner* and *Shabazz*, it is clear that prisoners' constitutional claims must be assessed under a reasonableness standard. In addition, as we demonstrated in our reply in support of the government's petition for certiorari (Pet. Reply Mem. 3 n.2), the two post-*Turner* and *Shabazz* cases cited by respondents (Br. 25 n.20) do not satisfactorily address the nature of outsiders' concerns when prison officials regulate to achieve safety in the institution. That some prisons have continued to function under the strictures of the *Martinez* standard hardly compels all to do so, against the better judgment of prison administrators. "[T]he Constitution 'does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.'" (*Turner*, slip op. 14-15 n.* (quoting *Bell* v. *Wolfish*, 441 U.S. at 554)).

Not only would strict scrutiny shift decisions about prison governance to the courts, it would also threaten to result in real and serious harms within federal prisons. Respondents have contended that the strict scrutiny standard will mandate the admission of certain printed matter into federal prisons that the BOP could keep out under a reasonableness standard. We described some of those materials in our opening brief (Br. 26). Some of those publications glorify white supremacy and racial violence; others portray and describe homosexual sadomasochism; still others instruct how to disarm an assailant (*ibid.*). Respondents now concede that some of that material is not appropriate for federal prisons (Br. 27 n.21). A strict scrutiny analysis might nevertheless have mandated its admission if prison officials could not satisfy the exacting burden of showing a serious risk of impending harm that the strict scrutiny standard demands.

We recognize that assessing the danger posed by any particular publication is a difficult task. Under any prison regulations, some errors will be made. The standard of review of those regulations, however, will determine whether regulations may be appropriately cautious or must be presumptively lenient.

Under strict scrutiny, prison officials will lose some measure of discretion to keep inflammatory materials out of prisons, even when they reasonably believe them to pose a risk of harm. If prison officials are right, but powerless to act, they will be unable to fulfill their obligation "[w]ithin this volatile 'community' * * * to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors * * * [and] the safety of the inmates themselves." *Hudson* v. *Palmer*, 468 U.S. 517, 526-527 (1984). The consequences of prison disruption would be borne by individual administrators, guards, or inmates and by the prison population as a whole. We submit that a standard for prison rules that requires more than "reasonableness" in regulating the potential threats to prison security from printed materials poses an unacceptable risk of harm that cannot be justified by any countervailing interest in free speech. The regulation of security-sensitive publications under a "reasonableness" standard provides the proper measure of deference to prison officials consistent with constitutional rights.

2. Respondents' characterization of the BOP's regulations as "content based" (Br. 28), and therefore deserving of heightened scrutiny, is incorrect as a factual matter and, in any event, irrelevant as applied to the prison context. We acknowledge that prison officials consider the content of publications under the BOP's regulations. That feature alone, however, does not make strict scrutiny applicable. To begin with, one factor that bears on the question whether a particular prison decision satisfies the reasonableness test is "whether prison regulations restricting inmates' First Amendment rights operate[] in a neutral fashion, without regard to the content of the ex-

pression" (*Turner*, slip op. 10). Considering content-neutrality in determining the "reasonableness" of a particular decision would be pointless if content-based regulations automatically required strict scrutiny. The reasonableness test is crafted to take account of such factors.

Second, the BOP's regulations are properly analyzed as "content neutral" because they are justified without regard to the content of the regulated speech.[9] The regulations address the content of publications only because of their "secondary effects" on security, discipline, and order. They do not seek to suppress any point of view. They are justified, therefore, by neutral penological aims and do not regulate "content" in the sense that warrants more stringent First Amendment scrutiny.

This Court recognized the distinction between the regulation of "effects" and the regulation of "content" in *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In that case, the Court sustained an ordinance that prohibited adult motion picture theatres within 1,000 feet of any church, school, or residential zone. The Court found that the ordinance was "aimed not at the *content* of the films shown," but rather at the *secondary effects* of such theatres on the

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[9] Respondents are incorrect in asserting that the government conceded in the court of appeals that the regulations are not content neutral (Br. 29). In the court of appeals, the BOP's brief stated that the argument that the regulations are not content neutral is not "well-taken" (Gov't Br. 31). The BOP maintained that the regulations were "viewpoint-neutral" although "content-related" (*id.* at 33). The government explained that "[t]he decision to admit or reject a publication is not * * * determined by an assessment of the content of the publication, but by an assessment of its impact upon a specific inmate population at a given time" (*id.* at 40).

surrounding community (*id.* at 47 (emphasis in original)). Those secondary effects were the prevention of crime, the maintenance of property values, and the protection of residential neighborhoods (*id.* at 48). Because the ordinance was aimed at those secondary effects, it was "completely consistent with [the Court's] definition of 'content-neutral' speech regulations as those that are *justified* without reference to the content of the regulated speech'" (*ibid.* (emphasis in original)).

In *Boos* v. *Barry*, No. 86-803 (Mar. 22, 1988), a plurality of this Court applied the *Renton* test in considering whether the District of Columbia's prohibition of signs critical of foreign governments within 500 feet of an embassy was content-based. The plurality noted that in *Renton* "[t]he content of the films being shown inside the theatres * * * was not the target of the regulation" (*Boos*, slip op. 6), and that *Renton* concerned "regulations that apply to a particular category of speech because the regulatory targets happen to be associated with the type of speech" (*ibid.*). The plurality interpreted *Renton* to hold that "[s]o long as the justifications for regulation have nothing to do with content * * * the regulation [is] properly analyzed as content neutral" (*ibid.*). The plurality then determined that the District of Columbia's regulation was not content neutral, as the government did not justify it by "point-[ing] to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies" (*Boos*, slip op. 7).

The "regulatory targets" of the BOP's regulations are security, order, and discipline within federal prisons. The regulations do not seek to restrict speech because of its viewpoint. Rather, as in *Renton*, the regulations are justified by an independent objective

—maintaining security in prisons. Thus, the regulations are properly analyzed as "content-neutral."

3. Even if this Court deemed the BOP's regulations to be content-based, lines can be drawn on the basis of content in a nonpublic forum, such as a prison, without subjecting the regulations to strict scrutiny. In *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, the Court upheld, under a reasonableness standard, prison restrictions on bulk mailings from unions, even though similar restrictions had not been imposed on bulk mailings from the Jaycees, Alcoholics Anonymous, and the Boy Scouts (433 U.S. at 133). In that case, the prison was drawing distinctions based on content by restricting only union-related bulk mailings, yet the Court refused to apply strict scrutiny. Similarly, in *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld a prohibition against disseminating newspapers, magazines, handbills, and other publications within the nonpublic forum of a military base when the publications "present[ed] a clear danger to the loyalty, discipline, or morale of troops" (*id.* at 831 n.2). Even if the regulation in *Greer* is viewed as a content-based restriction in speech, the banning of publications from the military base was upheld without requiring the regulation to satisfy the strict scrutiny test.[10] In the pres-

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[10] See also *Hazelwood School District* v. *Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 9, 12 (school-sponsored high school newspaper is not a public forum and educators can regulate "the style and content of student speech in school-sponsored expressive activities so long as thier actions are reasonably related to legitimate pedagogical concerns"); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city's ban on political advertisements in rapid transit system because advertising space on a transit system is not a public forum and because the restriction was

ent case, because a prison is "most emphatically not a 'public forum'" (*Jones*, 433 U.S. at 136; *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974)) and because the regulations at issue do not restrict publications based on the BOP's disagreement with any particular viewpoint, a reasonableness standard should apply.

Respondents do not dispute that prisons are nonpublic forums (Br. 30). Rather, they offer a variety of reasons why a nonpublic forum analysis is not applicable to the prison regulations in this case. That effort is unpersuasive and is not grounded in the decisions of this Court.

Respondents first contest that the relevant forum is the prison, and assert that the actual forum is the mails (Br. 30). But that distinction is of no use to them, because this Court has upheld the regulation of mail within a prison under a reasonableness standard. In *Turner* v. *Safley*, *supra*, the Court upheld a ban on inmate-to-inmate correspondence on the basis of the penological concerns raised by inmate mail. The Court's analysis in that case is irreconcilable with the notion that the mails must be viewed as a separate forum. Fragmenting a prison into a multiplicity of forums, some public, some quasi-public, some nonpublic, would serve no end but to promote litigation over distinctions that are irrelevant to the overriding need for security throughout a prison facility. In some cases, the Court has separated a government facility into different forums because of the specific nature of the access sought.[11] But the Court

based on legitimate concerns involving, inter alia, claims of favoritism that would most likely arise in the allocation of limited space).

[11] *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-801 (1985) (appropriate forum was charity drive aimed at federal employees to which access was sought, not the federal workplace as a whole); *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (appropriate forum was internal mailboxes of school system).

has never "ignore[d] the special nature and function" of the facility as a whole "in evaluating the limits that may be imposed on an organization's right to participate * * *." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

"Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not." *Adderley* v. *Florida*, 385 U.S. 39, 41 (1966). Respondents have pointed to no case in which this Court opened a prison to access under any type of public forum theory. To the contrary, the Court has treated prisons as quintessential nonpublic forums, even when limited access has been made available to certain persons. See *Pell* v. *Procunier*, *supra*.

4. Respondents next contend that even if the Court analyzed this case under nonpublic forum principles, the BOP's regulations are not valid under the applicable "reasonableness" test (Br. 32-36). At the outset we note that the question before this Court is whether the court below erred in failing to apply a "reasonableness" test, not whether the regulations and their application to particular publications are valid under that test. The court of appeals never engaged in an inquiry under a "reasonableness" standard, and if this Court concludes that reasonableness is the appropriate test, we submit that the proper course is to permit the court of appeals on remand to determine whether the regulations are valid under that standard. Nevertheless, we briefly address the grounds urged by respondents for invalidating the BOP's regulations under a reasonableness test.

First, respondents contend (Br. 32) that the BOP's regulations are invalid because they are not "view-

point neutral." As we discussed above, however, the regulations *are* properly analyzed as viewpoint-neutral under the appropriate test. The regulations authorize prison officials to exclude publications only because of security concerns. In any event, as we have noted, reasonable distinctions based on content are permissible in a nonpublic forum. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*; *Greer* v. *Spock*, *supra*.

Second, respondents argue that the BOP's regulations are unreasonable because they do not afford "alternative means by which the publisher can transmit the censored information to the prisoner subscriber" (Br. 34). Respondents fail to explain, however, why excluded material that is detrimental to prison security must be admitted through alternative channels in order to satisfy a reasonableness test. Since the total exclusion of certain material is necessary to achieve the aims of prison officials, there can be no requirement that the material be admitted in some manner in order to make the restriction "reasonable." The reasonableness test would make no sense if the exclusion of material from the front door was "reasonable" only if it had to be let in through the back. Presumably, even respondents do not contend that alternative access is required for materials such as "blueprints of a prison or instructions for the manufacture or use of drugs, keys, ammunition, or weapons, or advocacy of violence that is likely to result in violence" (Br. 15). By banning certain publications, the BOP's regulations do "no more than eliminate the exact source of evil [they] sought to remedy." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (upholding total prohibition of posting of signs on public property).

This Court has already twice rejected the logic of respondents' submission. In *O'Lone* v. *Estate of Shabazz*, *supra*, inmates who were members of the Islamic Faith were denied the opportunity to attend Jumu'ah, a weekly service held at a particular time of day. The Court noted that "[t]here are, of course, no alternative means of attending Jumu'ah; respondents' religious beliefs insist that it occur at a particular time" (slip op. 8). But the Court nevertheless reasoned that "we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end." Instead, in assessing the reasonableness of the prison regulations, the Court considered whether the inmates "retain the ability to participate in other Muslim religious ceremonies." *Ibid.* Similarly, in *Turner*, the Court considered whether inmates who were totally denied the right to correspond with each other still had sufficient alternative opportunities for expression (slip op. 12). Both of those cases demonstrate that under a "reasonableness" analysis, the "alternative channels" for the exercise of a right need not be identical to the activities restricted. In this case, publishers do not lack for alternative outlets of expression or inmates for reading material. Respondents offer no reason why these alternatives are not sufficient in this case, when similar restrictions were upheld in *Turner* and *O'Lone*.

The final argument advanced by respondents on the facial "reasonableness" of the BOP's regulations is that since "reading is not inherently incompatible" with incarceration (Br. 35), a complete prohibition on reading certain materials is not justified as a time, place, and manner regulation of speech. To begin with, however, the BOP does not regulate reading because it believes it to be "incompatible" with a

prison. As respondents note, the regulations afford inmates an ample opportunity to receive written matter. The BOP regulates the entry of written materials only to ensure prison security. The regulations simply adopt the view that certain publications have a sufficient propensity to stimulate disruption and that an ounce of prevention is worth a pound of cure. We fail to understand how the fact that the BOP finds the reading of most material unobjectionable affects the reasonableness of restricting other publications because of valid security concerns. If the reasonableness test is the proper standard, the fact that reading in general is not disruptive, and may even have rehabilitative effects, is irrelevant to the question whether the exclusion of particular materials is reasonably justified by security concerns.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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